Metcalfe	Russell
Moffett	Simpson
Morris	Smith of Hopkins
Patterson of Travis	Stinson
Powell	Talbert
Reed of Bowie	Tennyson
Reed of Dallas	Thornberry
Roark	Thornton
Ross	Westbrook
	Worley

Present—Not Voting

Harper

Absent

Felty	McCracken
Graves	Nicholson
Hull	Palmer
Johnson of Tarrant	Petsch
London	Rhodes
Mauritz	Riddle
	Sharpe

Absent—Excused

Bates	Hardin
Bradford	Howard
Cagle	Hyder
Davis of Haskell	McKinney
Dean	Oliver
Farmer	Quinn
Fox	Weldon

RECESS

On motion of Mr. Harris of Dallas, the House, at 11:20 o'clock a. m., took recess until 10:00 o'clock a. m., tomorrow.

APPENDIX

STANDING COMMITTEES REPORT

The Committee on Judiciary filed a favorable report on House Bill No. 17.

The Committee on Appropriations filed a favorable report on House Concurrent Resolution No. 6.

The Committee on State Affairs filed a favorable report on House Concurrent Resolutions Nos. 3 and 8.

EIGHTH DAY

(Continued)

(Thursday, June 10, 1937)

The House met at 10:00 o'clock a. m., and was called to order by Speaker Calvert.

(Mr. Knetsch in the Chair.)

LEAVES OF ABSENCE GRANTED

(By unanimous consent)

The following Members were granted leaves of absence, as follows:

Mr. Waggoner for today, on account of important business, on motion of Mr. Keith.

Mr. Callan for today, on account of important business, on motion of Mr. Boyer.

Mr. Heflin for today, on account of important business, on motion of Mr. Monkhouse.

Mr. Oliver for today and the balance of the week, on account of illness, on motion of Mr. Westbrook.

Mr. Metcalfe for today, on account of important business, on motion of Mr. Thornberry.

Mr. Vale for today, on account of important business, on motion of Mr. Celaya.

Mr. Stevenson for today and the balance of the week, on account of important business, on motion of Mr. Pope.

Mr. Hardin for today and the balance of the week, on account of important business, on motion of Mr. Prescott.

Mr. Petsch for today, on account of important business, on motion of Mr. Jones of Atascosa.

Mr. Mays for today and the balance of the week, on account of important business, on motion of Mr. Harper.

Mr. Loggins for today, on account of important business, on motion of Mr. Bradbury.

Mr. Cagle for today and the balance of the week, on account of important business, on motion of Mr. Derden.

Mr. Patterson of Mills for today, on account of important business, on motion of Mr. Brown.

Mr. Howard for today and the balance of the week, on account of important business, on motion of Mr. Davison of Fisher.

Mr. Newton for today, on account of important business, on motion of Mr. Bell.

Mr. Dickison temporarily for today on account of important business, on motion of Mr. Reader.

Mr. Sewell for today, on account of important business, on motion of Mr. Cauthorn.

Mr. Hanna for today, on account of important business, on motion of Mr. Derden.

Mr. Wood for today, on account of important business, on motion of Mr. Roark.

Mr. Bond for today and the balance of the week, on account of important business, on motion of Mr. Jones of Atascosa.

MESSAGE FROM THE SENATE

Austin, Texas, June 10, 1937.

Hon. R. W. Calvert, Speaker of the House of Representatives.

Sir: I am directed by the Senate to inform the House that the Senate has passed

H. C. R. No. 12, Permitting both Houses of the Legislature to stand adjourned from twelve noon, today, until 10:00 o'clock a. m., Monday, June 14, 1937.

Respectfully,

BOB BARKER,
Secretary of the Senate.

EXCUSING EMPLOYEES OF THE HOUSE FOR CERTAIN PERIOD

Mr. Kelt offered the following resolution:

Whereas, Many Members of the Legislature will be in attendance at the Pan American Exposition, Dallas, Texas, June 12, 1937; and

Whereas, Most of the Members of the House of Representatives will have completed practically all of their correspondence by said date; and

Whereas, The employees of House are desirous of being permitted to attend the Pan American Exposition in Dallas over the week-end; now, therefore, be it

Resolved, That the employees of House of Representatives be excused from their duties from Friday, June 11, 1937, until Monday, June 14, 1937.

KELT,
McKEE,
RUSSELL.

The resolution was read second time, and was adopted.

Mr. Thornton moved that the House adjourn until 10:00 o'clock a. m., next Monday, June 14.

Question recurring on the motion to adjourn, yeas and nays were demanded.

The motion was lost by the following vote:

Yeas—41

Alexander	Kenyon
Bell	Leonard
Blankenship	Leyendecker
Bond	Mann
Boyer	McCracken
Burton	McFarland
Carssow	McKee
Cauthorn	McKinney
Celaya	Morse
Davisson of Eastland	Nicholson
Deglandon	Palmer
Harris of Dallas	Reader
Hoskins	Riddle
Hull	Rutta
James	Schuenemann
Johnson of Ellis	Skaggs
Johnson of Tarrant	Smith of Hopkins
Jones of Falls	Tarwater
Keefe	Thornton
Keith	Walker
	Winfree

Nays—66

Adkins	Kelt
Alsup	Kern
Baker	King
Bates	Langdon
Beckworth	Lankford
Boethel	Lanning
Bradbury	Little
Bridgers	London
Brown	Lucas
Cleveland	McConnell
Davis of Haskell	McDonald
Davis of Jasper	Moffett
Davison of Fisher	Monkhouse
Derden	Morris
England	Patterson of Travis
Fielden	Powell
Fuchs	Prescott
Gibson	Reed of Bowie
Hamilton	Reed of Dallas
Hankamer	Roark
Harbin	Ross
Harper	Russell
Harrell	Sharpe
Harris of Archer	Shell
Harris of Dickens	Simpson
Hartzog	Stinson
Herzik	Talbert
Holland	Tennant
Huddleston	Tennyson
Hyder	Thornberry
Jackson	Westbrook
Jones of Angelina	Worley
Jones of Atascosa	
Jones of Wise	

Absent

Amos	Cathey
Broadfoot	Colquitt

Dollins
Felty
Graves
Knetsch
Leath
Mauritz
Pope
Ragsdale
Rhodes
Settle
Smith
of Matagorda
Smith of Tarrant
Stocks

Absent—Excused

Bradford
Cagle
Callan
Dean
Dickison
Farmer
Fox
Hanna
Hardin
Heflin
Howard
Loggins
Mays
Metcalfe
Newton
Oliver
Patterson of Mills
Petsch
Quinn
Sewell
Stevenson
Vale
Waggoner
Weldon
Wood

RELATIVE TO HOUSE BILL NO. 1

Mr. Hartzog moved to reconsider the vote by which the House heretofore voted certain instructions to the conference committee on House Bill No. 1.

Mr. Harris of Archer raised a point of order, on consideration of the motion, at this time, on the ground that the motion to reconsider the vote comes too late, since there has been more than one legislative day since the original motion was made.

The Chair sustained the point of order.

Mr. Gibson moved to suspend the Rule, relative to the making of motions to reconsider, in order that Mr. Hartzog might make the above motion.

The motion to suspend the Rule prevailed by the following vote:

Yeas—88

Adkins
Alexander
Alsup
Baker
Bates
Bell
Blankenship
Boethel
Boyer
Broadfoot
Brown
Burton
Carssow
Cathey
Cauthorn
Celaya
Cleveland
Colquitt
Davis of Haskell
Davis of Jasper
Davison of Fisher
Davisson
of Eastland
Dollins
England
Felty
Fuchs
Gibson
Hankamer
Harbin
Harper
Harrell
Harris of Dallas
Harris of Dickens
Hartzog
Herzik
Holland
Hoskins
Hull
Hyder
Jackson
James
Johnson of Ellis
Johnson
of Tarrant
Jones of Angelina
Jones of Atascosa
Jones of Falls
Keefe
Keith
Kenyon
Langdon
Lanning
Leonard
Leyendecker
Little
London
Lucas
Mann
McConnell
McCracken
McDonald
McFarland
McKee
McKinney
Moffett
Monkhouse
Morse
Newton
Nicholson
Patterson
of Travis
Powell
Prescott
Reader
Ross
Rutta
Schuenemann
Settle
Simpson
Skaggs
Stinson
Talbert
Tennant
Tennyson
Thornberry
Thornton
Vale
Walker
Westbrook
Winfree

Nays—26

Beckworth
Bradbury
Bridgers
Deglandon
Fielden
Hamilton
Harris of Archer
Huddleston
Jones of Wise
Kelt
Kern
King
Lankford
Loggins
Mauritz
Morris
Palmer
Pope
Reed of Bowie
Reed of Dallas
Roark
Russell
Sharpe
Smith of Hopkins
Tarwater
Worley

Absent

Amos
Derden
Graves
Knetsch
Leath
Ragsdale
Rhodes
Riddle
Shell
Smith
of Matagorda
Smith of Tarrant
Stocks

Absent—Excused

Bond
Bradford
Cagle
Callan
Dean
Dickison
Farmer
Fox
Hanna
Hardin
Heflin
Howard
Mays
Metcalfe
Oliver
Patterson of Mills
Petsch
Quinn

Sewell
Stevenson
Waggoner
Weldon
Wood

Mr. Hartzog then moved to reconsider the vote by which the House, on last Friday, voted certain instructions to the conference committee on House Bill No. 1.

Question recurring on the motion, yeas and nays were demanded.

The motion to reconsider prevailed by the following vote:

Yeas—70

Adkins
Alexander
Baker
Bates
Bell
Blankenship
Boethel
Boyer
Brown
Burton
Carssow
Cathey
Cauthorn
Celaya
Cleveland
Colquitt
Davis of Haskell
Davis of Jasper
Davisson of Eastland
Derden
Dollins
Felty
Gibson
Hankamer
Harbin
Harris of Dallas
Hartzog
Herzik
Holland
Hoskins
Hull
Hyder
Jackson
Johnson of Tarrant
Jones of Angelina
Jones of Atascosa
Jones of Falls
Keefe
Keith
Kenyon
Langdon
Lanning
Leonard
Leyendecker
Little
Lucas
Mann
McConnell
McCracken
McDonald
McFarland
McKee
Moffett
Monkhouse
Morse
Patterson of Travis
Powell
Ragsdale
Reader
Ross
Rutta
Schuenemann
Settle
Simpson
Stinson
Tennant
Thornton
Walker
Westbrook
Winfree

Nays—37

Alsup
Beckworth
Bradbury
Bridgers
Deglandon
England
Fielden
Fuchs
Hamilton
Harrell
Harris of Archer
Harris of Dickens
Huddleston
Johnson of Ellis
Jones of Wise
Kelt
Kern
King
Lankford
London
Mauritz
Morris
Nicholson
Palmer
Pope
Prescott
Reed of Bowie
Reed of Dallas
Roark
Russell
Sharpe
Smith of Hopkins
Talbert
Tarwater
Tennyson
Thornberry
Worley

Present—Not Voting

Harper

Absent

Amos
Broadfoot
Davison of Fisher
Graves
Heflin
James
Knetsch
Leath
McKinney
Rhodes
Riddle
Shell
Skaggs
Smith of Matagorda
Smith of Tarrant
Stocks

Absent—Excused

Bond
Bradford
Cagle
Callan
Dean
Dickison
Farmer
Fox
Hanna
Hardin
Howard
Loggins
Mays
Metcalfe
Newton
Oliver
Patterson of Mills
Petsch
Quinn
Sewell
Stevenson
Vale
Waggoner
Weldon
Wood

Mr. Prescott moved that the House adjourn until 10:00 o'clock a. m., next Monday, June 14.

The motion was lost.

Question then recurring on the motion, made on last Friday by Mr. Petsch, to instruct the Conference Committee on House Bill No. 1, yeas and nays were demanded.

The motion was lost by the following vote:

Yeas—39

Alsup
Beckworth
Bradbury
Bridgers
Broadfoot
Cathey
Davison of Fisher
Davisson of Eastland
Deglandon
Fielden
Fuchs
Hamilton
Harrell
Harris of Archer
Harris of Dickens
Herzik
Huddleston
Johnson of Ellis
Jones of Wise
Kelt
Kern
King
Lankford

London
Mauritz
Morris
Nicholson
Palmer
Prescott
Reed of Bowie
Reed of Dallas
Roark
Ross
Russell
Sharpe
Smith of Hopkins
Tarwater
Thornberry
Worley

Nays—72

Adkins
Alexander
Baker
Bates
Bell
Blankenship
Boethel
Boyer
Brown
Burton
Carssow
Cauthorn
Celaya
Cleveland
Colquitt
Davis of Haskell
Davis of Jasper
Derden
Dollins
Felty
Gibson
Hankamer
Harbin
Harper
Harris of Dallas
Hartzog
Holland
Hoskins
Hull
Hyder
Jackson
James
Johnson of Tarrant
Jones of Angelina
Jones of Atascosa
Jones of Falls
Keefe
Kenyon
Langdon
Lanning
Leath
Leonard
Leyendecker
Little
Lucas
Mann
McConnell
McCracken
McDonald
McFarland
McKee
McKinney
Moffett
Monkhouse
Morse
Patterson of Travis
Powell
Ragsdale
Reader
Rutta
Schuenemann
Settle
Simpson
Stinson
Talbert
Tennant
Tennyson
Thornton
Vale
Walker
Westbrook
Winfree

Absent

Amos
England
Graves
Keith
Knetsch
Pope
Rhodes
Riddle
Shell
Skaggs
Smith of Matagorda
Smith of Tarrant
Stocks

Absent—Excused

Bond
Bradford
Cagle
Callan
Dean
Dickison
Farmer
Fox
Hanna
Hardin
Heflin
Howard
Loggins
Mays
Metcalfe
Newton
Oliver
Patterson of Mills
Petsch
Quinn
Sewell
Stevenson
Waggoner
Weldon
Wood

Mr. Harris of Dickens moved that the House adjourn until 10:00 o'clock a. m., next Monday, June 14.

The motion was lost.

Mr. Harris of Dallas moved that the House stand at ease until 11:05 o'clock a. m., today.

Question recurring on the motion by Mr. Harris of Dallas, yeas and nays were demanded.

The motion prevailed by the following vote:

Yeas—76

Adkins
Alexander
Baker
Bates
Bell
Blankenship
Boethel
Boyer
Bridgers
Brown
Burton
Carssow
Cauthorn
Celaya
Cleveland
Colquitt
Davis of Haskell
Davis of Jasper
Derden
Dickison
Dollins
Felty
Gibson
Hamilton
Hankamer
Harbin
Harper
Harrell
Harris of Dallas
Hartzog
Holland
Hoskins
Hull
Hyder
Jackson
James
Johnson of Ellis
Johnson of Tarrant
Jones of Angelina
Jones of Falls
Keefe
Kenyon
Langdon
Lanning
Leath
Leonard
Leyendecker
Little
Lucas
Mann
McConnell
McCracken
McDonald
McFarland
McKee
McKinney
Monkhouse
Morse
Patterson of Travis
Powell
Ragsdale
Reader
Ross
Rutta
Schuenemann
Settle
Sharpe
Shell
Simpson
Stinson
Talbert
Tennant
Thornton
Walker
Westbrook
Winfree

Nays—37

Alsup
Beckworth
Bradbury
Cathey

Davison of Fisher	Mauritz
Davisson of Eastland	Moffett
Deglandon	Morris
Fielden	Nicholson
Fuchs	Palmer
Harris of Archer	Pope
Harris of Dickens	Prescott
Herzik	Reed of Bowie
Huddleston	Reed of Dallas
Jones of Atascosa	Roark
Jones of Wise	Russell
Kelt	Skaggs
Kern	Smith of Hopkins
King	Tarwater
Lankford	Tennyson
London	Thornberry
	Worley

Absent

Amos	Rhodes
Broadfoot	Riddle
England	Smith of Matagorda
Graves	Smith of Tarrant
Keith	Stocks
Knetsch	

Absent—Excused

Bond	Metcalfe
Bradford	Newton
Cagle	Oliver
Callan	Patterson of Mills
Dean	Petsch
Farmer	Quinn
Fox	Sewell
Hanna	Stevenson
Hardin	Vale
Heflin	Waggoner
Howard	Weldon
Loggins	Wood
Mays	

The House, accordingly, at 10:45 o'clock a. m., stood at ease until 11:05 o'clock a. m., today.

(The House reconvened at 11:05 o'clock a. m., and was called to order by Mr. Knetsch.)

TEXT OF CERTAIN OPINION

On motion of Mr. Worley, the following opinion was ordered printed in the Journal:

H. S. Cole, Appellant,
No. 17765. v.
The State of Texas, Appellee.
—Appeal from Fannin County.

OPINION

Conviction for violating the lottery law; punishment, a fine of $100.00.

We summarize the material points in the interest of brevity. Cole, appellant, was proprietor of two picture shows in Bonham. He admitted that in order to increase the patronage of his shows he had a scheme which he called bank night, and he also admitted that its operation had increased such patronage. All the witnesses who testified were connected with said theater, except the recipient of the prize, a Miss Johnson. According to their testimony the first step in the inauguration of bank night was the circulation of a book called a register. Either through solicitation or otherwise several thousand people signed this book. Ordinarily the signator wrote his own name, but a husband could sign for a wife, etc., or a friend for a friend. This book was kept on a stand at the door of one of said theaters so that anyone could sign who wished. Opposite each name on the register was a number. Each Tuesday night at the end of the first show (time not otherwise fixed) slips containing numbers,—said by appellant and his employees to correspond with those on said register,—were put into a container, from which one number was drawn out, compared with the book mentioned, and the name opposite that number in the book was announced, and if anyone present identified himself or herself as such named party, the prize referred to was awarded such person. Miss Johnson testified that she had signed the book at some unremembered date, and that she went to the show that night, bought her a ticket, and when the drawing was had her name was announced as the winner, and she identified herself and received the twenty-five dollar prize. It was also in testimony that no person could get a prize unless his name was on the register. A witness testified that when the name opposite the number drawn was announced in the theater, it was also announced outside. Time,—estimated by a witness at four or five minutes,—was given for the lucky person to appear and identify himself, and if no one did this in such time the prize for that night was left in the bank and added to that of the next bank night.

We have not attempted to set out in detail the testimony, but it is in substance what above appears. Thornton, a State witness but an employee of appellant for many years, said the purpose of bank night was for advertising, and the money was given away by appellant for that purpose.

As further back-ground for our opinion, we note that in the indictment appellant's bank-night scheme was described in detail, and it was alleged that at a moving picture show exhibited by appellant he drew and caused to be drawn from a container a number, and to the person opposite whose name on said book was a number identical with the one so drawn, appellant gave the prize, conditioned that the person whose number was drawn was present at said exhibition; also that appellant charged and caused to be charged the sum of twenty-five cents to be paid as the admission price by persons entering and seeing such picture show, and that appellant did then and there and by means of such lottery dispose of twenty-five dollars in money to Elizabeth Johnson.

That there was a prize, to-wit; twenty-five dollars in money; and that it was awarded by lot, viz: the drawing of numbers from a container; and that Miss Johnson, the winner, had paid her money in order to be present at the picture show, where such drawing was regularly had every Tuesday night,—were and are without dispute.

Any contention such as that no one was charged for writing his name in the book, and that no one could get a prize unless his name was in the book, and that this cut any figure in the decision as to whether the scheme was a lottery,—seems but idle talk. The purpose of the scheme was admittedly to get patrons into the theater on Tuesday nights, who should pay for their tickets, knowing that they were getting, in addition to seeing the show, a chance in a drawing for a prize of at least twenty-five dollars. If appellant purposed merely a fair means of identification of the holder of the lucky number, he could have easily given to the patrons entering the show on Tuesday nights consecutively numbered cards or tickets corresponding in numbers with those in the container,—but this method of operation would have lacked the desired smoke-screen of a book having on it not only the signatures of those in the theater but possibly of others; and more remotely possible the name of some person who might have left his home, used his gasoline and time, to come down to the show and stand in the weather on the outside,—upon the still greater possibility that a number corresponding to his in the book might be drawn and he be given information of this in time to enter, announce himself as a piker, and identify himself and get the prize.

The reports of the courts of last resort of our sister states are replete with the sad story of the efforts of men to invent schemes to circumvent the lottery laws of various states of our Commonwealth, but none seem to the writer more patently thus characterized than the one now under consideration. The ease with which the multitudes can be led to invest small sums upon glittering prospects of large gains, decided by the turn of a wheel or the drawing of a card, has led fertile brains to produce scheme after scheme. Their name is legion, but the inventors of this scheme seem to pitch their only hope of escape on the proposition that because the name of the winner must be on a book called a register, which had over three thousand names on it, and which was kept at a place where it was accessible to all persons, and because of testimony that when a drawing was had on Tuesday night, in accordance with said scheme, the name of the winner of the prize was announced, both inside and outside of the theater, and a four or five minute period given the winner to present and identify himself,—that somehow this takes out of the scheme some necessary element of a lotterv.

As said in State v. Lipkin, 169 N. C. 265:

"We cannot permit the promoter to evade the penalties of the law by so transparent a device as a mere change in style from those which have been judicially condemned, if the gambling element is there, however deep it may be covered with fair words or decietful promises. . . . The court will inquire not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited, or if it has the element of a game of chance."

As said by our Supreme Court in Randle v. State, 42 Texas, 584:

"The court informed the jury, that each and every drawing, where money or property is offered as prizes to be distributed by chance, according to a specified scheme or plan, and a ticket or tickets sold, which entitle the holder to money or property, and which is dependent upon chance, is an

offense; 'and that 'it made no difference whether every ticket entitled the holder to a sum certain or not, if there is an additional sum dependent upon the distribution by chance over the certain sum,' and that 'it makes no difference by what name it is called, but it is the distribution or offer to distribute the prizes in money by chance, to induce persons to buy tickets therein, and the sale of tickets, and drawing of the numbers, which constitute a lottery, and an offense against the law."

This is exactly in point, and is almost a perfect pen picture of the purpose of appellant,—as stated by him,—for operating the scheme. In our case it is hardly stated in other words. Appellant's purpose was to increase his business. How? By the distribution of prizes in money by chance to induce persons to buy tickets, and the sale of tickets, and drawing of the numbers, which constitutes a lottery, and is an offense against the law. The language of the opinion in Randle v. State, supra, is quoted with approval in Grant v. State, 54 Texas Crim. Rep. 403.

The fertile brain of him who devised this particular scheme seems to have been able only to offer as a defense the proposition concerning the book called a Register, on which any person could write his name, and appellant and his employees said on this trial that all names on the register were numbered, and slips containing all the numbers on the register were put into the container from which was drawn by chance the slip carrying the number of the winner. Again we repeat what is above quoted: "We are not concerned with the name, but the game." Whose number was drawn out on the occasion in question? Beyond dispute the number opposite the name of one who had bought a ticket entitling her to a sum certain (that is to see the show), and also an additional sum (the prize) dependent on the distribution by chance.

Failure to produce testimony peculiarly within the knowledge of the accused justly raises a presumption against him. Not a word of testimony appears in this record showing that any person not a patron of the picture show and in possession of a ticket thereto, had ever drawn a prize. Not a word can be found supporting the proposition that a number was ever drawn from the container which corresponded with the number opposite the name of some person who was outside the theater but near enough to be available. This ought to completely answer appellant's claim that the use of the book with names in it prevents his scheme from being a lottery. Facts not fancies should control. Actual workings and not theories must be looked to.

If, however, it could be shown on some trial that occasionally some one not a patron of the show had left his home and come to the theater, and was on the outside, and heard his name announced, and was allowed to enter, identify himself and receive the prize for that night,—would this have suffered to demonstrate that this scheme was not a lottery? We do not think so. As said by the Supreme Court of the State of Washington in State v. Danz, 250 Pac. 37:

"Manifestly it was the plan and purpose of appellants to get additional money by putting on the chance drawing. The testimony shows it was put on as an additional drawing card. The patrons knew it was 'Country Store' night. They paid a valuable consideration to participate. The fact that they paid the same price charged on other nights, when the theater was running a more popular play, without an added attraction, is not conclusive or controlling in favor of the appellants. A valuable consideration was paid. What did the purchaser get? Not simply a ticket for the screen show, but a ticket to that, and to the chance drawing. The appellants and their patrons so understood and intended it. That was the plan and purpose for which the consideration was paid. Nor is the fact that free tickets were offered to outsiders material in any controlling sense. None such had been given out as a matter of fact, but if there had been it would not of itself have made any difference. If in the flourishing days of the Louisiana lottery its management had advertised that it would give a free ticket to the president of every bank in New Orleans, that would not have changed the scheme from a lottery, whether or not anyone or all of such free tickets were accepted."

Substantially the same doctrine was announced by our Court of Civil Appeals at Dallas in Featherstone v. I. S. Sta. Ass'n., 10 S. W. (2d) 124 which case reveals an effort to evade the lottery law by a scheme "For the purpose of advertising their business

. . . and to promote good will among customers, gave tickets to whomsoever they pleased, to customers and noncustomers as well; hence this new scheme was lacking in one of the essential elements necessary to constitute a lottery, to-wit, the consideration." The court said:

"This testimony fails to show any material change in the scheme as originally operated, but reveals a change simply in the plan of its operation. While dealers, under the new plan, distributed tickets to noncustomers as well as to customers, it seems that the scheme was to distribute tickets, in the main to customers. as the evidence discloses that only a few, negligible in number, were given to persons other than customers. That the giving of tickets and the drawings and distribution of prizes, were inducement to patronage and unquestionably lured customers, is shown from the very satisfactory business results that followed."

In short we think it does not materially affect the scheme that there be a possibility that some one might get a prize who had not paid for a ticket. It is so plain as to be evident that appellant's purpose was, from no angle and in no sense, to induce people not to buy tickets to the show, but to rely on the fact that their names were on his book. Such proposition would be entirely opposed to his purpose and plan, which was,— as frankly admitted by him,— to increase the patronage of his show. No sane man would believe for a moment that appellant would continue for an extended period, as appears here. to operate a scheme the result of which would or could lose him money.

If the thing relied on here to defeat the claim that this scheme is a lottery, viz: that some of those who might get chances at the drawing, would get them without consideration,—should in fact be found true upon trial by appellant, he would not be here fighting to continue such operation, but would have quickly and of his own suggestion abandoned such scheme.

The indictment herein charged, as above stated, that on Jan. 15, 1935, appellant by means of a scheme called Bank Night established a lottery. We have set out sufficiently the facts, and also the manner in which the change was laid in the indictment. We quote portions of the court's charge to the jury:

"By lottery is meant a scheme for the distribution of prizes by lot or chance where one, on paying money or giving other thing of value to another, obtains a ticket which entitles him to receive a larger or smaller value, or nothing, as some formula or chance may determine, but it is absolutely essential in the lottery that there must be a prize, that there must be paid a consideration for the right to participate therein, and the prize must be awarded by lot."

In his application of the law to the facts the court told the jury as follows:

"Now if you should believe from the evidence beyond a reasonable doubt that the defendant, H. S. Cole, did about the 15th day of January, 1935, in Fannin County, Texas, and within two years prior to the return of the indictment, January 19, 1935, establish a lottery, as the term is above defined herein, and that he did by said lottery then and there dispose of said personal property, to-wit: $25.00 in money to Elizabeth Johnson as charged in the indictment, and that as a condition that said Elizabeth Johnson receive the said $25.00, she was required to be present at the picture show of said H. S. Cole, and that the said H. S. Cole as a prerequisite to her receiving the $25.00, charged or caused to be charged 25c as admission price to said exhibition of said picture show, you will find the defendant guilty as charged in the first count of the indictment and assess his punishment at a fine of not less than one hundred nor more than one thousand dollars. But unless you do so believe beyond a reasonable doubt. you will acquit the defendant in the first count of the indictment and so state in your verdict.

If you should believe from the evidence or have a reasonable doubt thereof that Elizabeth Johnson was not required by the defendant, H. S. Cole, to be present at said picture show and to have paid 25c to enter said picture show in order to entitle her to participate in the drawing, regardless of what you may find all the other facts in the case to be, you will find the defendant not guilty of the offense of establishing a lottery and of disposing of personal

property by lot as charged in the first count of the indictment."

The jury were further told in the charge as follows:

"If you believe from the evidence or have a reasonable doubt thereof that the $25.00 disposed of and awarded to the witness Elizabeth Johnson, was a gift from H. S. Cole, the receiver of which was determined by a drawing, you will find the defendant not guilty in the second count of the indictment and so state in your verdict.

"If you should find from the evidence or have a reasonable doubt thereof that the said witness, Elizabeth Johnson, who was awarded the $25.00 in value did not pay any consideration or any sum of money as a prerequisite to receive said sum of money and that said sum of money was not a common fund contributed by all who were entitled to participate therein, you will find the defendant not guilty as charged in the second count of the indictment."

Upon the submission of the case under the facts above detailed, and the law as above stated, the jury found appellant guilty.

We see no need for laborious review of the decisions of other jurisdictions. From the adoption of our earliest Constitution in Texas until now its forbiddance has not only been against lotteries but all schemes evidencing attempted evasion of the lottery principle. See Art. 3, Sec. 47, Constitution of Texas.

That the indictment covered everything contended for by appellant is evident. That the charge of the court gave him the full benefit of every defensive theory finding the slightest support in testimony is also true, as is the further fact that the verdict of the jury was responsive to and supported by the facts in evidence. Appellant charged Miss Johnson twenty-five cents for seeing his show and for getting her chance at the prize; he determined the ownership of the prize by chance; he awarded the money to the winner. The trimmings of the scheme, the coloring of the picture, the hypothetic free chance did not mislead the jury. We can not allow them to mislead the court.

We note that our Supreme Court in cause No. 6899, The City of Wink v. Griffith Amusement Co., 100 S. W. (2d) 695, opinion delivered December 30, 1936, held that Bank Night was a lottery.

The judgment is affirmed.

LATTIMORE, Judge.

(Delivered June 9, 1937)

H. S. Cole, Appellant,
No. 17765, vs.
The State of Texas, Appellee.
—Appeal from Fannin County.

CONCURRING OPINION

There is not now, nor ever has been, an attempt in this State to define by statute what constitutes a lottery. The term is defined by the statutes of only a few of the states. Corpus Juris, Vol. 38, page 288, Note 10, lists only four, but says "that such definitions seldom vary in substance from those established by the courts." Having no definition in our statute we must resort to the meaning given the term by popular usage as determined by the various courts. When that is done it is clear that three things must concur to establish a thing as a lottery. (a) A prize or prizes. (b) The award or distribution of the prize or prizes by chance. (c) The payment either directly or indirectly by the participants of a consideration for the right or privilege of participating. Texas Jur., Vol. 28, page 409, Sec. 2, deduces from our own cases the rule stated, and it appears that in every case from our own court where a scheme has been denounced as a lottery that the three elements mentioned are shown by the facts to have been present. See Randle v. State, 42 Tex. 580; Grant v. State, 54 Tex. Cr. R. 403; Prendergast v. State, 41 Tex. Cr. R. 358, 57 S. W. 850; Holoman v. State, 2 Tex. Cr. App. 610, and other Texas cases cited in Texas Jur. (supra). The same rule demanding the presence of the three elements named will be found stated in 17 Ruling Case Law, page 1222 and 38 Corpus Juris, page 286, with innumerable supporting cases cited under the text in each of said volumes.

The undisputed facts proven by the State show that no one present at the theater on 'Bank Nite' was entitled to have their name or number participate in the drawing for the prize unless their names were registered in the 'Bank Nite Book', for which registration no charge was made. Those absent from the theater on said night but whose names were

likewise registered without charge also participated in the drawing. So it will be seen that no direct consideration passed from the participants to appellant. It occurs to the writer that the vice in the scheme—the things which make it a subterfuge—are the following: The party who is in the theater is immediately present to identifv himself if perchance the number corresponding to the party's name on the book be drawn. If a number be drawn which corresponds to the name of some one not in the theater it appears to be a remote probability that such a one will be able to appear in the theater and identify himself within the short time allowed, and no possibility for such identification if the holder of the number drawn is not in the immediate vicinity of the theater. Therefore, it appears plain that those who have paid admission to the theater are in a more favorable position to claim the prize than one on the outside although the names of both have been registered in the book without charge. The practical working of the scheme is bound to be known to all patrons of the theater. If the prize would have gone to some one not present but remains unclaimed it is pyramided on the amount of the prize for the next 'Bank Nite' drawing. The conditions naturally excite or increase a desire on the part of those eligible by reason of their names being registered to pay the admission price to the theater in order to be more favorably situated to claim the prize on a 'Bank Nite' drawing, and in this way an indirect consideration does move from them to the operator of the scheme and furnishes the third indispensable element of a lottery.

The writer is not unmindful that the courts of a number of our sister states have reached the conclusion that the scheme here resorted to was not a lottery. For instance, Iowa v. Hundling, 264 N. W. 608, 103 A. R. L. 861; New Hampshire v. Eames, 183 Atl. 590; People v. Shafer, 289 N. Y. Supp. 649; Tennessee ex rel v. Crescent Amusement Col, 95 S. W. (2d) 310; People v. Cardas, 137 Cal. App. 788, 28 Pac. (2d) 99. In other states the courts have reached the conclusion that the scheme here involved was a lottery; for instance, Commonwealth v. Wall (Mass.), 3 N. E. (2d) 28. We do not cite civil cases where courts of equity are controlled by somewhat more liberal rules than may be resorted to in the construction of criminal statutes. Having the highest regard for the opinion of the courts of our sister states, the writer is impressed with the view that where the present scheme has been held not to be a lottery the cases have turned upon a failure to show a direct consideration from the participants, or at least from a part of them, in the drawing for the prize, whereas, unless our reasoning be faulty, there does appear to be an indirect consideration moving from the registrants in the book in the purchase of admission to the theater, thereby obtaining a more favorable situation to claim the prize than the outside registrants enjoy.

For the reasons stated I concur in the opinion of affirmance.

HAWKINS, Judge.

(Delivered, June 9, 1937)

TO PROVIDE FOR CERTAIN HIGHWAY MARKERS

The Chair laid before the House, for consideration at this time, House Concurrent Resolution No. 5, to provide for certain highway markers.

The resolution having heretofore been read second time, and referred to the Committee on Highways and Motor Traffic.

The Committee on Highways and Motor Traffic having recommended the adoption of the resolution.

Mr. Harrell offered the following amendment to the resolution:

Amend House Concurrent Resolution No. 5, by changing the word "directed" to "requested" in the first line of the resolving clause.

The amendment was adopted.

Question—Shall the resolution be adopted?

HOUSE BILL ON FIRST READING

The following House bill, introduced today (by unanimous consent), was laid before the House, read first time, and referred to the appropriate committee, as follows:

By Mr. Johnson of Ellis:

H. B. No. 22, A bill to be entitled "An Act amending Article 661, Penal Code of Texas, 1925, by providing that if the seller of goods to be delivered at a future date does not then have the title to or possession of such

goods, it shall be deemed prima facie evidence of the fact that such seller and such purchaser had no bona fide intention that such commodity was to be delivered, but that a settlement was to be made based upon the difference between the contract and market price of such commodity; providing what shall be a sufficient allegation of the offense in an indictment, and declaring an emergency."

Referred to the Committee on Criminal Jurisprudence.

Mr. Pope moved that the House adjourn until 10:00 o'clock a. m., next Monday, June 14.

Mr. McKee moved that the House recess until 2:00 o'clock p. m., today.

Question first recurring on the motion to adjourn, yeas and nays were demanded.

The motion was lost by the following vote:

Yeas—34

Baker	McCracken
Blankenship	McKee
Cauthorn	Morse
Deglandon	Pope
Dickison	Prescott
Felty	Reader
Fuchs	Russell
Hardin	Rutta
Harris of Dallas	Schuenemann
Hartzog	Settle
Hoskins	Shell
Hull	Skaggs
James	Tennant
Johnson of Tarrant	Thornton
Kenyon	Vale
Leonard	Walker
Mauritz	Winfree

Nays—58

Adkins	Dollins
Alexander	Fielden
Alsup	Gibson
Bates	Hamilton
Beckworth	Harrell
Bell	Harris of Archer
Boethel	Holland
Bradbury	Huddleston
Bridgers	Jackson
Broadfoot	Johnson of Ellis
Brown	Jones of Angelina
Burton	Jones of Atascosa
Carssow	Jones of Falls
Cathey	Jones of Wise
Cleveland	Kelt
Colquitt	Kern
Davisson of Eastland	King
Derden	Langdon
Lanning	Lankford
London	Powell
Lucas	Reed of Bowie
Mann	Roark
McConnell	Ross
McDonald	Simpson
McFarland	Stinson
Moffett	Stocks
Monkhouse	Talbert
Patterson of Travis	Tarwater
	Westbrook
	Worley

Absent

Amos	Leyendecker
Boyer	Little
Celaya	McKinney
Davis of Haskell	Morris
Davis of Jasper	Nicholson
Davison of Fisher	Palmer
England	Ragsdale
Graves	Reed of Dallas
Hankamer	Rhodes
Harper	Riddle
Harris of Dickens	Sharpe
Herzik	Smith of Hopkins
Hyder	Smith of Matagorda
Keefe	Smith of Tarrant
Keith	Tennyson
Knetsch	Thornberry
Leath	

Absent—Excused

Bond	Mays
Bradford	Metcalfe
Cagle	Newton
Callan	Oliver
Dean	Patterson of Mills
Farmer	Petsch
Fox	Quinn
Hanna	Sewell
Harbin	Stevenson
Heflin	Waggoner
Howard	Weldon
Loggins	Wood

The Chair announced that there was not a quorum present.

Mr. Fielden moved a call of the House, for the purpose of securing and maintaining a quorum until 12:45 o'clock p. m., today, and the call was not seconded.

Mr. Moffett moved a call of the House, for the purpose of securing and maintaining a quorum until 12:50 o'clock p. m., today, and the call was duly ordered.

On motion of Mr. Russell, the Sergeant-at-Arms was instructed to bring in all absent Members within the city who are not ill.

The roll of the House was called, and the following Members were present:

Adkins	Alsup
Alexander	Baker

Beckworth
Bell
Blankenship
Boethel
Boyer
Bradbury
Bridgers
Broadfoot
Brown
Burton
Carssow
Cauthorn
Cleveland
Colquitt
Davis of Haskell
Davis of Jasper
Davison of Fisher
Davisson of Eastland
Deglandon
Derden
Dickison
Dollins
England
Felty
Fielden
Fuchs
Gibson
Graves
Hamilton
Hankamer
Harrell
Harris of Archer
Harris of Dallas
Harris of Dickens
Hartzog
Huddleston
Hull
Hyder
Jackson
James
Johnson of Ellis
Johnson of Tarrant
Jones of Angelina
Jones of Atascosa
Jones of Wise
Keefe
Keith
Kelt
Kenyon
Kern
King
Knetsch
Langdon
Lankford
Lanning
Leath
Leonard
Little
London
Lucas
Mann
Mauritz
McConnell
McDonald
McFarland
McKee
McKinney
Moffett
Monkhouse
Morris
Morse
Palmer
Pope
Powell
Prescott
Reader
Reed of Bowie
Reed of Dallas
Roark
Ross
Russell
Rutta
Schuenemann
Settle
Shell
Simpson
Skaggs
Smith of Hopkins
Stocks
Talbert
Tarwater
Tennant
Tennyson
Thornberry
Thornton
Walker
Westbrook
Winfree
Worley

Absent

Amos
Bates
Cathey
Celaya
Harbin
Harper
Herzik
Holland
Hoskins
Jones of Falls
Leyendecker
McCracken
Nicholson
Patterson of Travis
Petsch
Ragsdale
Rhodes
Riddle
Sharpe
Smith of Matagorda
Smith of Tarrant
Stinson

Absent—Excused

Bond
Bradford
Cagle
Callan
Dean
Farmer
Fox
Hanna
Hardin
Heflin
Howard
Loggins
Mays
Metcalfe
Newton
Oliver
Patterson of Mills
Quinn
Sewell
Stevenson
Vale
Waggoner
Weldon
Wood

The Chair announced that there was a quorum present.

ADJOURNMENT

Mr. Leonard moved that the House adjourn until 10:00 o'clock a. m., next Monday, June 14.

Mr. Worley moved that the House recess until 2:30 o'clock p. m., today.

Question first recurring on the motion to adjourn, yeas and nays were demanded.

The motion prevailed by the following vote:

Yeas—52

Adkins
Baker
Blankenship
Boethel
Boyer
Carssow
Cauthorn
Celaya
Davis of Haskell
Deglandon
Dickison
Dollins
Felty
Fuchs
Gibson
Hankamer
Harris of Dallas
Harris of Dickens
Hartzog
Holland
Hyder
Jackson
James
Johnson of Tarrant
Jones of Falls
Kenyon
Leonard
Little
Mann
Mauritz
McDonald
McKee
McKinney
Morse
Palmer
Pope
Prescott
Reader
Russell
Rutta
Schuenemann
Settle
Shell
Simpson
Skaggs
Smith of Hopkins
Talbert
Tarwater
Thornton
Vale
Walker
Winfree

Nays—51

Alsup
Beckworth
Bell
Bradbury
Bridgers
Broadfoot
Brown
Burton
Cathey
Cleveland

Colquitt	Lankford
Davis of Jasper	Lanning
Derden	London
England	Lucas
Fielden	McConnell
Graves	Moffett
Hamilton	Monkhouse
Harrell	Morris
Harris of Archer	Patterson
Huddleston	of Travis
Hull	Powell
Johnson of Ellis	Reed of Bowie
Jones of Angelina	Reed of Dallas
Jones of Atascosa	Roark
Jones of Wise	Ross
Keefe	Stocks
Keith	Tennant
Kelt	Tennyson
Kern	Thornberry
King	Westbrook
Langdon	Worley

Absent

Alexander	Leyendecker
Amos	McCracken
Bates	McFarland
Davison of Fisher	Nicholson
Davisson	Ragsdale
of Eastland	Rhodes
Harbin	Riddle
Harper	Sharpe
Herzik	Smith
Hoskins	of Matagorda
Knetsch	Smith of Tarrant
Leath	Stinson

Absent—Excused

Bond	Mays
Bradford	Metcalfe
Cagle	Newton
Callan	Oliver
Dean	Patterson of Mills
Farmer	Petsch
Fox	Quinn
Hanna	Sewell
Hardin	Stevenson
Heflin	Waggoner
Howard	Weldon
Loggins	Wood

The House, accordingly, at 12:35 o'clock p. m., adjourned until 10:00 o'clock a. m., next Monday, June 14.

APPENDIX

REPORT OF THE COMMITTEE ON ENGROSSED BILLS

Committee Room,
Austin, Texas, June 9, 1937.

Hon. R. W. Calvert, Speaker of the House of Representatives.

Sir: Your Committee on Engrossed Bills, to whom was referred

H. C. R. No. 12, Permitting both Houses of the Legislature to stand adjourned from 12:00 noon today, until 10:00 a. m., Monday, June 14, 1937.

Has carefully compared same and finds it correctly engrossed.

BRIDGERS, Chairman.

REPORT OF THE COMMITTEE ON ENROLLED BILLS

Committee Room,
Austin, Texas, June 10, 1937.

Hon. R. W. Calvert, Speaker of the House of Representatives.

Sir: Your Committee on Enrolled Bills, to whom was referred

H. C. R. No. 12, Permitting both Houses of the Legislature to stand adjourned from 12:00 noon, today, until 10:00 a. m., Monday, June 14, 1937.

Has carefully compared same and finds it correctly enrolled.

HERZIK, Chairman.

NINTH DAY

(Monday, June 14, 1937)

The House met at 10:00 o'clock a. m., pursuant to adjournment, and was called to order by Mr. Tennyson.

The roll of the House was called, and the following Members were present:

Adkins	Davisson
Alexander	of Eastland
Alsup	Deglandon
Amos	Derden
Baker	Dickison
Beckworth	England
Bell	Farmer
Blankenship	Felty
Boethel	Fielden
Bond	Fox
Boyer	Fuchs
Bradbury	Gibson
Bridgers	Graves
Broadfoot	Hamilton
Brown	Hankamer
Burton	Hanna
Cagle	Harbin
Callan	Hardin
Carssow	Harper
Cathey	Harrell
Celaya	Harris of Archer
Cleveland	Harris of Dallas
Colquitt	Harris of Dickens
Davis of Haskell	Hartzog
Davis of Jasper	Herzik
Davison of Fisher	Holland